How to manage a Trial Period exit.
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The 90 Day Trial Period can be a useful tool for employers, but it is not without challenges and risk.

Contrary to some opinion, I haven’t seen any evidence of employers using the 90 Day Trial Period to turnover staff every three months. When you think about it, this is a crazy point of view. Anybody who has had to recruit, hire and manage people knows the time and effort it takes. Getting good people and keeping them is critical to business success, intentionally turning your staff over every three months would be totally mad and a massive waste of time.

In the small business sector, where every hiring decision has a significant commercial and cultural impact on the business, the trial period can provide a valuable safety net for decision makers. In a business of 5 people a single replacement hire makes up 20% of the total workforce, so it is critical to get this right. The trial period does perform a valuable function and can get a business out of hot water when a genuinely bad recruitment decision is made.

However, there remains a lot of misconception about the trial period rules, which is evidenced by the fact most (if not all) trial period case law rulings against employers resulted from the courts finding the trial period was not valid and therefore not enforceable.

How do you make sure the trial period is valid?

1. **A TRIAL PERIOD IS FOR UP TO 90 DAYS FROM THE EMPLOYEES FIRST DAY OF WORK AND CANNOT BE EXTENDED.**

   Yes, this includes leave of any kind. Meaning if you agree to allow a new employee to take a pre-planned holiday of 3 weeks after they have worked for a month, the holiday is part of the trial period. Or if the employee has 4 sick days during the first 90 days, you cannot bump the trial period back by 4 days to account for this.

   Or if you reach the end of the 90 day trial period and you are not sure about the employee, you cannot decide to extend the trial period further while you make up your mind.

2. **THE EMPLOYEE CANNOT HAVE BEEN EMPLOYED BY YOU BEFORE.**

   Our advice to business owners is to err on the side of caution here. The term “employed” is arguably very clear and therefore could exclude people who are not technically employed by you, such agency temps and contractors. But MBIE’s own website advice states: “An employee can’t be on a trial period if they’ve worked for that employer before.”
We therefore advise businesses to consider all workers under this requirement (and while we have found this to be contrary to the advice of some employment lawyers) we think it is the safest approach. Let’s be honest about this; if you have had an agency temp or contractor with you for a number of weeks and you’re thinking about offering them a permanent job, why do you need a trial period? Surely if you continue to have doubts about them you shouldn’t be considering a permanent job offer at all?

Under this category, you also need to be very careful about workplace “testing” where the “test” involves a job candidate performing work so you can assess them. As a general rule of thumb we recommend you do not have the person performing any work that would otherwise be completed by a paid employee or that you receive any commercial gain from, it should not be for an extended period and they should also not receive any pay for the test. It is advisable to have a short agreement included in the Application Form stating that the recruitment process includes workplace testing.

3. THE EMPLOYMENT AGREEMENT MUST HAVE BEEN SIGNED BEFORE THE FIRST DAY OF EMPLOYMENT.

In this situation before means strictly before. It is not acceptable for the person to sign the agreement on their first day. And certainly not after they have started working for you. There are numerous cases where employers have issued agreements after the person has started and the trial period was deemed to be invalid. There is no grey area in this: before means before.

4. THE EMPLOYEE MUST HAVE BEEN PROVIDED A REASONABLE OPPORTUNITY TO REVIEW THE AGREEMENT, SEEK ADVICE AND ASK QUESTIONS BEFORE SIGNING.

In addition to point 3 above, you should not provide an employee with an agreement the day before they start and then insist they sign it. Employees are entitled to review your formal offer of employment, seek advice about the terms, ask questions and/or negotiate the offer. They should be given a reasonable opportunity to do so, particularly as a trial period does not automatically apply (see point 6 below).

In our view a best practice timeline is 7 days between issuing the employment agreement and the employee’s start date.
"What!" I hear you shout, “That's crazy, our recruitment needs are urgent, we need people to start right away!” It's pretty simple though; if they start immediately and sign the agreement later, there is no valid trial period in place. Weigh up the risk of delaying the start date by a couple of days vs. immediate start with no trial period, you can't have it both ways.

As a fall back, for fast-paced industries, 2 working days can be considered reasonable.

We put a lot of effort into making sure employers have measured and planned recruitment processes and staffing contingencies to avoid such panic hiring. Effort up-front can save a lot of hassle and risk later on.

5. THE AGREEMENT MUST CONTAIN A TRIAL PERIOD CLAUSE AND IT MUST RELATE TO THE SPECIFIC WORDING IN THE EMPLOYMENT RELATIONS ACT.

An old “Probationary Period” clause, relabelled “90 Day Trial Period” does not cut it. Get some advice or look at the MBIE website to get this right, it is critical.

A Trial Period is a voluntary provision. You do not have to have a trial period for new employees, it's a business decision and trial periods do not automatically apply to every new employee. Which is why the employment agreement must contain this clause. Telling somebody verbally that there is a trial period is not enough.

6. GOOD FAITH OBLIGATIONS STILL APPLY.

The trial period does not give an employer licence to behave badly. Open, honest and transparent communication is still required. Be prepared to listen, treat the employee fairly and with dignity at all times.

7. PERSONAL GRIEVANCE PROTECTION IS FOR UNFAIR DISMISSAL ONLY.

An employee can still take a grievance for discrimination or disadvantage. Relating this back to point 6 above, you need to make sure you have given your new people every chance at success.

This might all sound complex and daunting, but it is actually fairly straightforward once you have a clear process established. The rules ensure employees are protected while giving employers scope to manage problems.